

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

**In the Matter of the Petition for Early
Termination of Probation By:**

Rex Lloyd P. Rhoten, M.D.

**Physician's and Surgeon's
Certificate No. A 62823**

Petitioner.

Case No. 800-2020-073231

DECISION

The attached Proposed Decision is hereby amended, pursuant to Government Code section 11517(c)(2)(C), to correct a clerical error that does not affect the factual or legal basis of the Proposed Decision. The Proposed Decision is amended as follows:

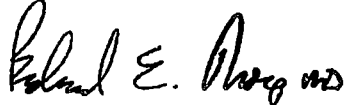
1. Page 1, paragraph 3: The name of the Deputy Attorney General is corrected to read "Joseph F. McKenna III."
2. Page 3, paragraph 3: The anticipated probation end date is corrected to: "July 17, 2023."

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on May 13, 2022.

IT IS SO ORDERED April 14, 2022.

MEDICAL BOARD OF CALIFORNIA



**Richard E. Thorp, M.D., Chair
Panel B**

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

**In the Matter of the Petition for Early Termination of
Probation Filed by:**

REX LLOYD P. RHOTEN, M.D., Petitioner

Physician's and Surgeon's Certificate No. A 62823

Case No. 800-2020-073231

OAH No. 2022020250

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference/telephonically on February 23, 2022, due to the ongoing COVID-19 pandemic.

David M. Balfour, Attorney at Law, Buchalter, APC, represented petitioner, Rex Lloyd P. Rhoten, M.D., who was present.

Joseph P. McKenna, Deputy Attorney General, represented the Attorney General pursuant to Government Code section 11522.

The matter was submitted on February 23, 2022. Personal identifying information was redacted from the exhibits after submission.

PROTECTIVE ORDER SEALING CONFIDENTIAL RECORDS

Exhibit 2 and Exhibit 5 contain confidential information. It is impractical to redact the information from these exhibits. To protect petitioner's privacy and the confidential personal information in those exhibits from inappropriate disclosure, the exhibits are ordered sealed. This sealing order governs the release of the documents to the public. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517 may review the documents subject to this order, provided that the documents are protected from release to the public.

SUMMARY

In 2018, the Medical Board of California (board) revoked petitioner's certificate, stayed the revocation, and placed him on probation for five years with terms and conditions because he was convicted of a substantially related crime, used alcohol in a dangerous manner, and engaged in unprofessional conduct because he drove under the influence of alcohol in 2016. Petitioner seeks to terminate his probation one year early. He showed by clear and convincing evidence that it is not contrary to the public interest to grant his petition and terminate his probation.

FACTUAL FINDINGS

License and Disciplinary History

1. On June 20, 1997, the board issued Physician's and Surgeon's Certificate No. A 62823 to petitioner. His license will expire on January 31, 2023, unless renewed.

2. On September 14, 2017, the board's then-Executive Officer filed an accusation entitled *In the Matter of the Accusation Against Rex Lloyd Patrick Rhoten, M.D.*, Case No. 800-2016-020655. The accusation alleged three causes for discipline: conviction of a substantially related crime, dangerous use of alcohol, and general unprofessional conduct, all arising from petitioner's arrest and subsequent conviction for driving under the influence in 2016.

3. Effective March 29, 2018, pursuant to a stipulated settlement signed by petitioner and his attorney, who also represented him in this proceeding, the board revoked petitioner's license, stayed the revocation and placed his license on probation for five years with various terms and conditions. Those terms included requirements that petitioner abstain from using alcohol, successfully complete an ethics course, participate in psychotherapy, undergo medical and clinical diagnostic evaluations, submit to biological fluid testing, attend a weekly substance abuse support group meeting, have a worksite monitor who provides written reports to the board, file quarterly reports with the board, and pay probation monitoring costs. Petitioner's probation is set to expire on March 29, 2023.

Petition for Penalty Relief

4. On August 27, 2020, petitioner executed a Petition for Penalty Relief seeking termination of his probation. He attached numerous documents to his petition which are referenced below.

PETITION

5. Petitioner identified his medical specialty as neurosurgery. He currently has privileges at Paradise Valley Hospital and Alvarado Medical Center. In the "Current Compliance" section of the petition, petitioner checked off the box marked "yes" asking if any civil malpractice claims have been filed against him. However, at this hearing he testified that the litigation had been resolved with no findings of negligence against him, and the settlement was made on behalf of another physician involved in the surgery.

PETITIONER'S NARRATIVE STATEMENT

6. In his narrative statement, petitioner wrote that he has "gone through significant changes, both in my personal life and in my professional life." He wrote:

First, I want to say unequivocally that I take full responsibility for my DUI. I've had to re-examine my life's path as a practicing neurosurgeon and as a responsible husband and father. Every aspect of my life has been changed in some form by the DUI and the criminal and Medical Board probations that resulted from my misdemeanor conviction.

Remorseful, embarrassed, and especially contrite, I have aimed to be grateful for my life in recovery since my driving under the influence (DUI) charge against me since 2016. I began an intensive outpatient program in December 2016 followed by residential rehabilitation treatment in January 2017. I learned many extremely important life lessons while in rehab and in the subsequent months and years since that inpatient stay. As a result of these lessons learned, I now abstain from alcohol and have been sober since January of 2017. I was diagnosed with Bipolar Depression II and began treatment that has been quite helpful. The only medications I take are the regularly scheduled prescribed medications that have been given to me by a licensed physician. I attend regular AA meetings, including 4-5 per week, all remotely since the Covid-19 pandemic of early 2020. Further, I speak with my sponsor, a fellow physician, weekly or biweekly, depending on the circumstances of that particular week. I seek counsel from my psychotherapist monthly and have frank and earnest sessions with him at those monthly meetings. I attended the professionalism program that was required by the Medical Board of California (MBC). I have not participated in the solo practice of medicine since my probation began in 2017 and check in regularly with my work site monitor. I also get my biological fluids tested 4-6 times per month as stipulated by the Medical Board on a random basis, checking in daily per the First Source

monitoring application, even when I am on vacation or traveling for continuing medical education events. I stay in constant contact with the Medical Board's designee for all work related probationary issues and make sure that all probationary costs are timely paid. I make sure I follow each and every stipulation in my disciplinary order.

I am committed to remaining sober and practicing neurological surgery safely. I believe I have shown that I'm able to do that over the last 3 1/2 years by using the techniques listed above. I believe I am sufficiently rehabilitated and stable in my recovery such that the Medical Board can lift my probationary restrictions while remaining assured that I will continue to provide safe care to patients. The way in which I have approached my probation and the manner in which I have walked on a new path has changed my life for the better. The last 3 1/2 years have been humbling and difficult, but they have also been some of the most rewarding as well, by keeping me sober and allowing me to look at myself honestly and with an intentionality and willingness to change to improve myself. The consequences of my DUI have been painful for me professionally, and personally. I have lost friends, lost my house and lost most of the jobs that I had lined up in 2016. At the same time, I have developed a strong support system with my family, my recovery community, and with my treating healthcare providers. I know, in my heart of hearts,

that I am a changed man forever as a result of this time in my life. I am confident I can and will remain sober no matter what obstacles arise; indeed, I have remained sober despite the professional and personal obstacles I have faced since my DUI. I know that in the future, the changes I have made will make me a stronger person and a better physician, husband and father.

My probationary status has prevented me from obtaining insurance contracts, hospital privileges at certain hospitals in numerous employment opportunities. I have applied for over 45 jobs, including neurosurgical clinical jobs, locum tenens positions, non-clinical research jobs, and various other positions that require a medical license in other states. Without fail, each of these people has told me that while I am well qualified for the job, they will not or cannot hire me because of the current probationary status of my California medical license. I would foresee that getting my probation lifted would allow me to obtain contracts with insurance companies and allow me to see patients who I have not been able to treat because of insurance issues. In addition, I expect many hospitals will be willing to grant me privileges, which they have not been willing to do while I am on probation. I also expect there would be both permanent employment opportunities and locum tenens work that I could pursue if my probation were to be lifted.

As of the date of this petition, I have served at my first 2 1/2 years of probation and fully complied with all terms. I now ask with a remorseful attitude, and with a committed focus to maintaining my recovery for the remainder of my career, that my probation be lifted, so that I may return to the full and unrestricted practice of neurological surgery, pursue additional employment opportunities and contracts with insurance companies and possibly gain privileges at other hospitals where I have not been granted privileges because of the probationary status of my license. I have practiced neurosurgery for twenty three years, and have developed significant experience and expertise, I feel like I am in a position to be a vital asset to my patients and society at large and I hope that you see value in that prospect and agreed to terminate my probation early.

PROMISES TREATMENT CENTER'S EVALUATIONS

7. Petitioner sought in-patient treatment at Promises Treatment Center. On January 16, 2017, Gregory Skipper, M.D., the Promises Director, who is a Distinguished Fellow, American Society of Addiction Medicine, and board certified in internal medicine, and Matthew Goldenberg D.O., board certified in psychiatry and addiction psychiatry, and the associate director at Promises, co-authored an "Intensive Diagnostic & Initial Psychiatric Evaluation Comprehensive Report." The report documented the multidisciplinary diagnostic evaluation performed on petitioner, the diagnoses made, and the treatment rendered. Petitioner's family history, psychiatric history, substance abuse history, social history, and education and employment history

were documented. Petitioner advised that his wife recently gave him an ultimatum to get sober, and he sought treatment at Promises because he was "unable to control drinking." Petitioner was admitted for residential substance abuse treatment and psychiatric care on January 13, 2017. He was diagnosed with Alcohol Use Disorder Severe; Bipolar II Disorder; and Anxiety Disorder Unspecified. Numerous recommendations were made, and petitioner was instructed he should not practice medicine until successfully completing treatment.

8. On March 13, 2017, Dr. Skipper and Dr. Goldenberg co-authored a Final Discharge Summary. Petitioner was discharged on March 11, 2017, "after successful completion of 60 days of residential treatment." The summary detailed petitioner's alcohol use and three prior attempts at sobriety. Petitioner participated in all aspects of the Promises program, which was seven days per week with two hours or more of individual psychotherapy, one hour or more of family therapy, weekly scheduled medication management and psychotherapy with an addiction psychiatrist, regularly scheduled meetings with the physician director, and 32 hours of group therapy per week including six hours of profession-specific programming. Petitioner also participated in daily mutual-support groups and was an active part of the professionals' program milieu. Petitioner was encouraged to address healthy lifestyle issues such as daily exercise, meditation, and nutrition. He was drug tested at least twice per week and all tests were negative. He also used a breathalyzer device at least twice a day to document the absence of any alcohol use and his readings were consistently negative. The letter summarized petitioner's reports from his primary therapist, addiction psychiatrist, and physician director, who referenced petitioner's active participation in recovery, serious efforts, and good progress. Petitioner's discharge diagnoses were Alcohol Use Disorder, Severe; Bipolar II Disorder, in full remission; and Anxiety Disorder Unspecified. The letter identified the list of

recommendations for petitioner to follow and noted that he was fit to practice and return to duty.

9. On November 13, 2017, Dr. Skipper authored a six month Follow-Up Evaluation report documenting his November 9, 2017, follow-up evaluation. In the Past History section, Dr. Skipper wrote:

[Petitioner] continued to intermittently struggle with alcohol use. He was arrested for DUI after a single car accident in February 2016. He participated in an Intensive Outpatient Program in December 2016. Shortly thereafter despite his commitment to remain abstinent he went on a 3 day binge. His wife gave him an ultimatum to get treatment or else. He has an extensive family history of alcoholism.

[Petitioner] stated confidently that he never allowed alcohol to interfere with his work. He never drank on call and has never had a complaint at work regarding alcohol use. He denied any history of withdrawal including tremor, seizures or DTs.

Dr. Skipper noted that the medication to treat petitioner's recent diagnosis of Bipolar II Disorder had greatly stabilized his mood and he was sleeping better. Petitioner had actively pursued recovery and expressed how "this time things are very different," noting that his treatment "beginning last spring" was the first time he had taken sincere efforts toward recovery. Dr. Skipper noted that petitioner was very cooperative, followed all suggestions, and was actively involved in developing his own aftercare plan. Petitioner had been completely compliant in his aftercare agreement,

remained totally abstinent, and was doing well. Petitioner's sponsor and his group facilitator each reported that petitioner was doing well. Petitioner's current diagnoses were Alcohol Use Disorder, Severe, Early Remission; and Bipolar II Disorder, Full Remission. Dr. Skipper concluded that petitioner was fit to practice.

SUPERIOR COURT AND DEPARTMENT OF JUSTICE DOCUMENTS

10. On September 22, 2020, the district attorney's office responded to petitioner's Penal Code section 1203.4 motion to have his conviction set aside, advising the court that it did not oppose that motion. The district attorney stated:

[Petitioner] has complied with his probation for more than 4 years. He has remained law-abiding and his declaration shows that he has taken strides to become a contributing member of society. Being on probation limits his ability to advance in his career and prevents him from helping other people. As such the People are unopposed to relief.

11. On November 2, 2020, the Superior Court granted petitioner's motion for dismissal of his conviction pursuant to Penal Code section 1203.4 and granted early termination of his probation pursuant to Penal Code section 1203.3.

12. In a "Subsequent Disposition Notification," the Department of Justice advised the board that on November 2, 2020, petitioner's conviction had been set aside and dismissed pursuant to Penal Code section 1203.4.

BOARD-APPROVED PSYCHIATRIST'S LETTERS OF SUPPORT

13. Clark Smith, M.D., D.F.A.P.A., was the board-approved physician who evaluated petitioner as required by the board's order. Dr. Smith is a Distinguished

Fellow of the American Psychiatric Association, board certified in general psychiatry, addiction psychiatry, forensic psychiatry and pain medicine. His curriculum vitae listed his professional experiences, his many honors and awards, and his numerous presentations.

14. In his November 30, 2017, letter addressed to petitioner's attorney, Dr. Smith wrote that he first evaluated petitioner on December 15, 2016, and diagnosed him with Alcohol Dependence and Bipolar II Disorder, mixed, with chronic insomnia. On January 8, 2017, petitioner was referred to the Pamarro Center for alcohol detoxification treatment and then referred to Promises rehabilitation treatment program, which specializes in care for medical doctors. After he was discharged from Promises, petitioner "was referred to an intensive outpatient treatment program, for intensive outpatient (IOP) treatment and ongoing aftercare." He was also encouraged to enter a sober living home. Petitioner declined those recommendations, stating he was unable to move into a sober living home because he would be unable to take night calls at his medical practice.

Petitioner returned to his residence and continued with individual appointments with Dr. Smith once a month. His bipolar disorder was well stabilized on medication, he was "functioning at a much improved level" and he was "enthusiastic about remaining clean and sober." Petitioner was "very frustrated by his inability to work" and was "trying to find a solution to this." He would be going on a medical mission to Tanzania in January 2018 and was "very excited about this."

Dr. Smith concluded:

[Petitioner] appears to be dramatically improved from the time of my first evaluation, nearly 12 months ago. He is

sincerely remorseful about the DUI offense and seems dedicated to remaining clean and sober to avoid any future relapse into alcohol dependency. I strongly recommend that he continue with his course of mood stabilizing medication and that he remain involved in recovery activities to sustain his abstinence from the use of alcohol. In my opinion, with these measures in place, he will not be a danger to the community in the future.

15. Dr. Smith authored a second letter dated July 28, 2020, in support of this petition. Dr. Smith wrote that he has been treating petitioner "since December 2016 when he entered my intensive outpatient chemical dependency treatment program, RecoveryWorks, in San Diego." Petitioner "had been self-medicating with periodic alcohol for chronic insomnia and recurrent bouts of depression since he was a teenager." Dr. Smith noted that despite those "obstacles," petitioner "was very successful academically and professionally. A very capable and conscientious person and physician, he was able to maintain control and manage everything" until his DUI. Although petitioner "did not truly believe that he had a problem," he "accepted my professional direction and entered intensive outpatient treatment. When he had a relapse, he accepted my direction again toward a residential treatment program, at first with John Milner, MD [s/c] for detox treatment and then in the specialized program for medical doctors at Promises."

Dr. Smith wrote that he diagnosed petitioner with Bipolar II Disorder with alcohol dependence in a binge pattern, as self-medication, and started petitioner on mood stabilizing medication. The combination of that treatment plus 60 days of sobriety "made a dramatic change." Petitioner "felt clearer and healthier than he had in

years. He still had mild depression, but was completely committed to maintaining his sobriety and recovery from that point on, without fail." Dr. Clark wrote further:

I have seen [petitioner] deal with monumental struggles, personal, professional, and financial, and yet his commitment to his recovery has not wavered. He was an extremely strong person throughout his career, but he is a much stronger person now.

I am very proud to write this letter of support for [petitioner]. He is very deserving of the Medical Board's consideration of reducing the term of his probation, so that he can return to the full practice of medicine, hospital privileges, and insurance panels. He is living proof of the power and potential of recovery. He will continue to be a positive role model for other physicians in recovery as well.

Dr. Clark invited board members to contact him if they requested any additional information and provided his cell phone number.

GROUP FACILITATOR'S LETTERS

16. Ann Glassmoyer, Clinical Social Worker, University California San Diego (UCSD) Health Professional Program, wrote a letter to petitioner's attorney on November 3, 2017, confirming petitioner's participation in UCSD's health professional program, a monitoring group to support physicians in recovery and provide documentation of their sobriety. Petitioner began attending the weekly, facilitated monitoring support group in September 2017 and has been forthcoming about his history with alcohol. "He has demonstrated a willingness to take direction and accept

recommendations to ensure his ongoing sobriety." In addition to the weekly monitoring group meetings, petitioner attends multiple community 12 step meetings every week, has a sponsor, and has developed a fellowship of sober peers. Petitioner "is living a recovery centered lifestyle and seems to be well engaged in the 12 step recovery community." Petitioner has been using a portable breathalyzer with facial recognition since October 2017, and all test results have been negative for the presence of alcohol. Petitioner "demonstrates remorse about the consequences of his alcohol abuse and is motivated to remain sober and reclaim his professional life. He has become a valuable member of our group." Petitioner "accepts direction from physicians with more time in recovery and reaches out to support those who are new to the process." Petitioner "has significant supports in place toward long-term maintenance of sobriety." Ms. Glassmoyer enclosed a copy of the breathalyzer results documenting petitioner's negative results

17. Ms. Glassmoyer wrote a letter to the board on July 3, 2020, under penalty of perjury in support of the petition. She wrote that petitioner has participated in UCSD's Health Professional Program (HPP) since September 2017 and "has been fully compliant with all mandates of his participation for the entire time." Ms. Glassmoyer explained that HPP is "a program designed to promote public safety, wellness and quality healthcare by providing monitoring and support to physicians with substance abuse disorders in a confidential setting. Through his participation in HPP, [petitioner] has documentation of both his ongoing sobriety and his engagement in recovery."

Ms. Glassmoyer wrote further:

[Petitioner] attends a weekly, facilitated support group and has become a valuable member of the group setting.

[Petitioner] demonstrates insight into both the disease

concept of addiction and the recovery process. He is forthcoming about the circumstances that brought him to the attention of the [board] and shares openly about the supports he has in place toward long-term maintenance of sobriety.

[Petitioner] used the SoberLink (SL) breathalyzer device from September 2017 until the [board] began facilitating his testing in the spring of 2018. During the time he used SL, [petitioner] submitted breathalyzer tests three times a day at a consistent basis. All his breathalyzer tests were negative for the presence of alcohol.

I'm aware of the [board's] Accusation and the imposed probationary discipline placed on [petitioner's] license as a result of the [DUI] charge over 4 ½ years ago. Since that time, [petitioner] completed inpatient treatment, has participated in monitoring and has developed a strong fellowship of sober support within the 12-step community.

To my knowledge, [petitioner] has complied with all the terms of his [board] probation.

[Petitioner] is generous with his recovery and routinely reaches out to physicians new to the process. He has become a mentor to others participating in HPP and has a strong fellowship among other medical professionals in recovery.

In addition to his participation in HPP, [petitioner] is active in community 12-step recovery. He attends AA meetings weekly, has a sponsor and a home group and works the steps. [Petitioner] demonstrates mature recovery due to his ability to apply 12 step concepts to all aspects of his life.

[Petitioner] routinely expresses gratitude for his recovery, is motivated to remain sober and has the supports in place to do so. Through his sharing in group, it is evident that [petitioner] is living a recovery-centered lifestyle which promotes wellness in both his physical and emotional health.

Without reservation, I fully support [petitioner's] request to terminate his probation with the [board]. He is fully engaged in recovery and I believe he should be able to reclaim control of his very esteemed professional career.

Ms. Glassmoyer provided her phone number if the board had any questions or needed additional information.

18. Ms. Glassmoyer authored a third letter written to the board on February 10, 2022, under penalty of perjury. She supported the petition and described petitioner as "an engaged, valuable and compliant participant" of the HPP program. She wrote that petitioner's participation "has been consistent with the program's mission as evidenced by his compliance with all mandates of participation, his history of negative tests results [s/c] and the significant fellowship of support he's developed among colleagues and within 12 step recovery." Petitioner "celebrated 5 years of

sobriety in January 2022 and has a strong fellowship of support with recovering colleagues and community 12-step recovery." Petitioner "has a sponsor in place, attends a home group and is living a recovery-centered lifestyle. He applies 12 step principles to all aspects of his life, particularly important for physicians with high demands on their time." Petitioner "continues to be generous with his recovery by reaching out to others new to the process." Ms. Glassmoyer wrote further:

During the health crisis, [petitioner] participated in online meetings all over the world in addition to attending HPP and his regular San Diego 12 step meetings. [Petitioner's] curiosity about the recovery of others, his gratitude for his own and the supports he has in place are sufficient for the maintenance of long-term sobriety. I fully support [petitioner's] request to terminate probation.

LETTER OF SUPPORT FROM CURRENT TREATING PSYCHOLOGIST

19. Eric Van Der Voort, Psy.D., authored a letter to the board, under penalty of perjury, in support of the petition on February 11, 2022. Dr. Van Der Voort began treating petitioner on June 18, 2021, when Dr. Smith retired. He has a "standing biweekly appointment" with petitioner "to help him address various issues, including but not limited to his history with alcohol use and his overall mental wellness." Dr. Van Der Voort diagnosed petitioner with Bipolar I Disorder, in partial remission, most recent episode depressed; and Alcohol Use Disorder, in sustained remission. Dr. Van Der Voort wrote that petitioner has been consistent in attending all his psychotherapy appointments. Petitioner "has continued to report several uninterrupted years of sobriety from alcohol." Petitioner "has worked hard to ensure" that another DUI does not happen, "regularly shares with me his commitment to his long-term sobriety and

to the utility of having a sober support group." Petitioner "chooses to socialize with his support supports [sic] outside of meetings, which is a positive sign of his investment into his recovery" and petitioner's behaviors since his DUI "have demonstrated a commitment to regaining the trust of his peers, the [board], and patients he treats." Dr. Van Der Voort called petitioner "very deserving" of the board's consideration for early termination of probation.

LETTERS OF SUPPORT FROM COLLEAGUES, SPONSOR, AND WIFE

20. Robert Kearney, M.D., FACS, authored a letter under penalty of perjury on June 26, 2020, in support of the petition. Dr. Kearney met petitioner in May 2019 after petitioner referred him a patient and ultimately assisted Dr. Kearney with the surgery. Shortly thereafter, petitioner began subleasing office space from Dr. Kearney and since that time, Dr. Kearney has referred several patients to petitioner for a second opinion regarding spine and central nervous system issues. Petitioner's "judgment in those cases was always consistent with what the other physicians were thinking and in one case I felt more confident with his judgment than theirs." Petitioner "is always professional and appropriate." Dr. Kearney and petitioner "cross paths in the office once or twice a week," and Dr. Kearney has "gotten to know [petitioner] pretty well since that time." Dr. Kearney is aware of petitioner's DUI, his blood alcohol level, and his compliance with the board requirements. Petitioner attends the required individual therapy as well as undergoing monitoring with blood, urine and hair samples. Dr. Kearney also knows two physicians who worked with petitioner in Marina Del Rey prior to petitioner moving to San Diego in 2015 and those physicians told Dr. Kearney that petitioner "always carried himself in a professional manner and was a well-respected member of the medical community in Marina Del Ray." Dr. Kearney "fully supports" the petition.

21. Kevin Yoo, M.D., F.A.A.N.S., F.A.C.S., authored a letter to the board under penalty of perjury on July 29, 2020. Dr. Yoo is a fully licensed neurosurgeon practicing in San Diego, who is "quite familiar" with petitioner's past issues with alcohol and the board's "imposed probationary discipline" on petitioner's license. Dr. Yoo is a colleague of petitioner's who fully supports this petition. Dr. Yoo and petitioner have been working together since 2018, providing neurosurgical coverage to the emergency room and hospitalists at Alvarado Medical Center and Paradise Valley Hospital. Petitioner has performed well, and Dr. Yoo has never observed him to be under the influence of alcohol or any other substances. Dr. Yoo and petitioner have talked on "multiple occasions" about all the required testing and reporting petitioner must do for the board, and to the best of Dr. Yoo's knowledge, petitioner has been compliant with those requirements.

22. On February 10, 2022, Dr. Yoo wrote another letter to the board under penalty of perjury in support of the petition. He and petitioner had previously been "working together close since 2015" at Kaiser and since 2017 were "working together very closely" at Paradise Valley Hospital and Alvarado Medical Center. Petitioner has "performed well," never been under the influence, and "talked on multiple occasions" with Dr. Yoo about his board-ordered requirements. Dr. Yoo believes petitioner has complied and he recommends the board grant this petition.

23. Thomas R. Farrell, M.D., authored a letter to the board on July 3, 2020, under penalty of perjury in support of the petition. Dr. Farrell wrote:

Specifically, I am able to comment on the status and quality of [petitioner's] recovery program. I have been sponsoring and assisting other men in their 12 step recovery programs for three decades. [Petitioner] is well into his fourth year

sobriety [sic] and I have been his sponsor for three years. We met frequently, and until recently, attended many meetings together. We talk now by phone to discuss navigating life's challenges using recovery tools.

[Petitioner] conducts an active 12 step recovery program. He attends 200 or so meeting [sic] per year and shares forthrightly. He helps other men using the details of his recovery story. I have known [petitioner] long enough to watch him work through many difficult family and professional challenges and conduct himself. Now in the midst of the global pandemic, he is using the time to enhance his sobriety program. I am confident that he will stay sober through this and the many certain future trials, and that much good will come out of it for his family, patients, others in recovery and himself.

I have known [petitioner] long enough to see him make a very important transition in recovery. Many men in early recovery are convinced they can stay sober if they are able to fix their outside circumstances, their family, work living arrangements, and so forth. This is a common and dangerous misconception. The main objective of a recovery program is "to fit ourselves be of maximum service". [sic] [Petitioner] has learned the crucial lesson of recovery that our circumstances do not dictate our recovery, that he is to recover regardless of them. To the extent that the

decision regarding his disposition depends upon the status and quality of his recovery program, I can attest that [petitioner's] current program is solid.

24. Dr. Farrell authored a second letter to the board under penalty of perjury on February 9, 2022, which was similar to the one he authored in 2020.

25. Petitioner's wife wrote a letter to the board on July 21, 2020, under penalty of perjury, in support of her husband's petition. She has "witnessed firsthand his unwavering dedication and daily commitment to adhering to all requirements of the [board]." She wrote:

[Petitioner] has proven, by actions and not just words, to me and our children that he is truly remorseful for his mistake 3 years ago and has never faltered in his sobriety. [Petitioner] has never once wavered from doing what has been asked of him by the [board] he has never once been not in compliance and has put his sobriety above all else. While on family vacations he drives long distances to attend meetings and once had a drive two hours from our vacation to get to an approved testing site and he has complied with everything the [board] has asked him to do.

This has not been easy for our family. Having his license on probation has limited the source of income to support our family. Locally, hospital privileges were denied and he must have applied to hundreds of Locum Tenens jobs and was turned down due to his probationary status. We lost our

house and had to change schools for our children. Despite this heavy emotional toll, [petitioner] has willingly and fully complied with all terms of his probation and has never compromised his sobriety. This has taken an emotional toll on our family and we need to move forward.

Having the restrictions of probation removed would allow [petitioner] to progress to a new level with his recovery by restoring his full ability needs [sic] to be able to move forward and be able to practice medicine. [Petitioner] has been offered job opportunities once his probationary term is concluded. [Petitioner] is a very skilled and dedicated neurosurgeon who desires to provide his services to more patients, who I firmly believe would benefit from his expertise and experience. I believe [petitioner] has, through his compliance with probation and his commitment to sobriety, earned consideration for early termination of his probation.

26. Petitioner's wife authored a second letter to the board on February 11, 2022, under penalty of perjury. She wrote how she has "witnessed firsthand [petitioner's] unwavering dedication and daily commitment to his sobriety and adhering to every single stipulation set forth by the [board] when his probation started in 2018." She referenced petitioner's "unwavering commitment to sobriety," and the "tremendous respect" he has earned from her, his AA sponsor, and his colleagues.

12 STEP MEETING ATTENDANCE DOCUMENTS

27. Log sheets from 12 step meetings attested to petitioner's regular attendance at those meetings. Often, petitioner attended meetings daily.

PETITIONER'S CURRICULUM VITAE

28. Petitioner's curriculum vitae listed his education and employment experience. He was board-certified by the American Board of Neurological Surgery in 2003. He has held leadership positions in the hospitals where he had/has privileges and in various professional organizations. He has made numerous presentations and published several articles.

Witness Testimony

29. Dr. Kearney testified consistent with his letter. Dr. Kearney is a plastic surgeon who has been licensed in California since 2000. He has known petitioner for approximately three years, leasing office space to him. Dr. Kearney is aware of the matters at issue; he read the accusation and investigation report and also went online and "read the whole Internet story."

Dr. Kearney has gotten to know petitioner very well over the last few years, and has "lots of interaction" with petitioner. The two physicians also share a few patients as Dr. Kearney has referred his patients to petitioner for neurosurgery consults and petitioner has referred his patients to Dr. Kearney for plastic surgery consults. Dr. Kearney has observed petitioner's skills, judgment and abilities, trusts petitioner and has no concerns regarding petitioner's care and treatment of patients.

Dr. Kearney has never observed petitioner under the influence and believes petitioner is a "changed guy." Dr. Kearney has known physicians with drug and alcohol

problems, has observed those who do and those who do not change, and petitioner acts like those who have changed. Dr. Kearney does not consider petitioner an alcoholic, believing instead that he is more like someone who drank too much and had a motor vehicle accident. Of note, Dr. Kearney's opinions in this regard are not relevant and were not considered in rendering this decision. Moreover, petitioner fully acknowledged he is an alcoholic, making Dr. Kearney's opinion even less persuasive.

In addition to sharing office space, Dr. Kearney has occasionally run into petitioner on a few social occasions. At no time did he ever observe petitioner under the influence or in possession of alcohol, which was something Dr. Kearney specifically looked for as he was sensitive to that issue involving petitioner.

Dr. Kearney explained that because he has not known petitioner for a long time, petitioner is not someone he would "go out on a limb for" unless he believed in his sobriety and ability to safely practice medicine. Dr. Kearney is testifying for petitioner because he believes his probation should be terminated. Dr. Kearney feels "very strongly" that impaired physicians should not be seeing patients, and he would not testify on petitioner's behalf if he believed petitioner was not safe to practice. In fact, if he thought that petitioner was unsafe, Dr. Kearney would contact the board and request that his probation be extended.

Petitioner's Testimony

30. Petitioner described his education and employment history; he has been licensed in California since 1997. He testified consistent with the numerous documents filed in support of his petition. He described the "embarrassment, remorse and self-pity" he felt after the DUI, describing it as "one of the dumbest mistakes of my life." He knew "after I fully accepted my responsibility for that DUI that I needed help." He

sought treatment with Dr. Smith, an addiction specialist, and an intensive inpatient treatment program at Promises. Dr. Smith has since retired, and petitioner is now treating with psychiatrist Dr. Moore, and with psychotherapist Dr. Van der Voort, who authored a letter on his behalf, and whose records were received in evidence. Petitioner fully acknowledged that he is an alcoholic and must spend the rest of his life being sober if he wants a satisfying life.

Petitioner described the Promises program and all that he learned from it. He explained how after being diagnosed as bipolar and finally being prescribed the appropriate medication, that "all changed." His depression went away, it felt as though "someone flipped a switch," and his whole outlook on life changed. He had sought treatment for alcohol in the past, but this time he "just knew" Promises was different and that he needed help. He has fully embraced his sobriety and now feels "happy, joyous and free" as a result of this acceptance. He regularly attends AA meetings, he has a sponsor, he attends sober living group meetings, sponsors and helps others, and even if his petition is granted, nothing will change as he intends to continue doing what he is doing even after probation ends. He also has participated in international AA meetings which he finds "really interesting" as he gets to meet people all over the world through AA.

Petitioner finds it really helpful to assist individuals who are new to the recovery program, including incarcerated individuals. Assisting individuals who are early in their sobriety is very helpful in maintaining his sobriety. He reaches out to newcomers as much as possible and intends to do all that he is currently doing even after his probation ends. Petitioner has a strong, supportive recovery network. He has a group of sober friends with whom he socializes; he regularly attends meetings, he has a sponsor and sponsors others, he treats with a psychiatrist and a psychoanalyst, and he

does all these things to help himself become a better person which he wants to continue to do going forward.

Petitioner currently provides neurosurgical services for emergency matters at Alvarado Medical Center and Paradise Valley Hospital and serves on committees at each of the hospitals. He works four to 12 shifts per month, in 20 hour cycles, approximately 10 to 20 days per month. He is often treating spinal trauma and performing emergency surgeries. The work varies depending on the emergencies presented. He also shares call at those facilities which is a 24 hour shift. Petitioner is paid \$100 per day for 24 hour call coverage and if the patient has insurance other than Medicaid, petitioner does not get paid for his surgery services because he is not on any insurance panels, other than Medicaid, because of his probation. Petitioner has sought numerous job opportunities and been told that he should reapply once his probation ends.

When asked what assurances he can give to the board that he will never have another DUI, he explained that he is sober, plans on staying sober, has reflected on his sober lifestyle, and realizes that he wants to live the rest of his life in a sober fashion. He also believes his sobriety has been a benefit to his patients because it has made him more humble, and the humility he is able to show translates easily to being more empathetic to his patients, and he believes his patients see and feel that. His sobriety also gives him patience and an ability to communicate better and create better connections with his patients which he can "definitely feel."

Petitioner presented as a humble, respectful witness who answered all questions posed to him directly and did not shy away from difficult topics. On cross-examination petitioner was asked numerous questions about his history of alcohol use and statements he made to the investigating officer at the scene of the DUI accident.

However that testimony was not terribly persuasive as the issue to be decided in this proceeding is not the facts surrounding his past use or the DUI, but rather whether petitioner has demonstrated sufficient rehabilitation since those events such that terminating his probation early would not jeopardize public protection. As found below, it would not.

Petitioner's Legal Brief

31. Petitioner set forth factual and legal arguments in a brief in support of the petition which have been considered.

Petition for Penalty Relief Report

32. According to the Petition for Penalty Relief Report, as of December 27, 2021, petitioner is in compliance with the terms and conditions of his probation. The report referenced several violations during probation which petitioner explained at this hearing. On three occasions petitioner's quarterly declaration was late; his second quarter report in 2018 was one day late, his fourth quarter report in 2018 was seven days late, and his second quarter report in 2019 was one day late. Petitioner did not explain these delays. Petitioner's third quarter 2019 psychotherapy report was six days late. Petitioner testified that he repeatedly reminded Dr. Smith about the pending deadline, but, as petitioner credibly explained, other than those reminders, petitioner had no control over when Dr. Smith wrote and/or mailed that report to the board.

On three occasions, March 6, 2020, September 16, 2021, and January 26, 2021, petitioner received noncompliance letters for failing to check in with FSSolutions, the board-approved drug screening company. Petitioner explained that on one of those occasions he was on vacation, got up early to hike, and simply forgot to call; on another occasion he was sick, remained in bed, and forgot to call; he does not know

why he missed the third occasion. Petitioner's routine has been to immediately call FSSolutions when he wakes up in the morning, before he even gets out of bed, and then tests if he is required to do so. In fact, once while on vacation he was required to test so he drove two and one-half hours each way to get tested. On the two occasions where he knows why he missed the calls, he explained how his routine was altered, which was why he forgot; he has no explanation for the third missed call. Petitioner's last violation was paying his 2020 probation monitoring costs six weeks late. As he credibly explained, he simply did not have the funds to pay them on time, but he paid those costs when he had sufficient funds to do so.

33. The report documented the probation monitor's discussion with petitioner during which he told him he was seeking early termination because he is committed to his sobriety, has complied with all the conditions of probation, but that the restrictions on his license make it difficult to find work and have been a financial hardship on his family. The restrictions cause problems with future employers and make it difficult to find new employment.

34. The probation monitor documented his conversation with Dr. Smith who told the probation monitor that he has not seen any evidence of alcohol or substance abuse and has no concerns of abuse. The probation monitor documented his conversation with Dr. Kearney during which he said he has no concerns of a relapse, believes petitioner has learned from his mistake and changed for the better, and that petitioner "has definitely changed."

The Parties' Closing Argument

35. Petitioner asserted that he had met his burden of proof, that he had a change of heart following his DUI, successfully addressed his alcohol abuse, and

understands what is at stake should he relapse. Petitioner has been compliant with probation, save for a few minor violations, but most importantly never missed a drug screen test and never tested positive for alcohol. Petitioner was already sober and enrolled in a rehabilitation program before probation and is extremely active in his sobriety, even counselling others. He requested his probation be terminated.

36. The Attorney General opposed petitioner's request that his probation be terminated. The deputy attorney general, who also represented complainant in the underlying accusation, argued that petitioner had not met his burden of proof and that all that petitioner has done is not enough to ensure patient safety. The Attorney General further asserted that petitioner had agreed to five years of probation and those five years should remain in effect. That argument was not persuasive and would render meaningless Government Code section 11522 and Business and Professions Code section 2307, which together allow licensees placed on probation for three or more years to petition for early termination after two years.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In a pleading to restore a disciplined professional license, the burden rests on a petitioner to prove rehabilitation and that petitioner is entitled to have the license restored. (*Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.)

2. A person seeking penalty relief must present strong proof of rehabilitation sufficient to overcome the board's former adverse determination. The standard of proof is clear and convincing evidence. (*Housman v. Bd. of Medical*

Examiners (1948) 84 Cal.App.2d 308, 315; *Hippard v. State Bar of California* (1989) 49 Cal.3d 1084, 1092-1093.)

Relevant Code Sections and Regulation

3. Government Code section 11522 provides in part:

"A person whose license has been revoked . . . may petition the agency for . . . reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition. The agency shall give notice to the Attorney General of the filing of the petition and the Attorney General and the petitioner shall be afforded an opportunity to present either oral or written argument before the agency itself. The agency itself shall decide the petition, and the decision shall include the reasons therefor.....This section shall not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty."

4. Business and Professions Code section 2307 states, in part:

(a) A person whose certificate has been surrendered while under investigation or while charges are pending or whose certificate has been revoked or suspended or placed on probation, may petition the board for reinstatement or modification of penalty, including modification or termination of probation.

(b) The person may file the petition after a period of not less than the following minimum periods have elapsed from the effective date of the surrender of the certificate or the decision ordering that disciplinary action:

[¶] . . . [¶]

(2) At least two years for early termination of probation of three years or more.

[¶] . . . [¶]

(c) The petition shall state any facts as may be required by the board. The petition shall be accompanied by at least two verified recommendations from physicians and surgeons licensed in any state who have personal knowledge of the activities of the petitioner since the disciplinary penalty was imposed.

(d) The petition may be heard by a panel of the board. The board may assign the petition to an administrative law judge designated in Section 11371 of the Government Code. After a hearing on the petition, the administrative law judge shall provide a proposed decision to the board or the California Board of Podiatric Medicine, as applicable, which shall be acted upon in accordance with Section 2335.

(e) The panel of the board or the administrative law judge hearing the petition may consider all activities of the

petitioner since the disciplinary action was taken, the offense for which the petitioner was disciplined, the petitioner's activities during the time the certificate was in good standing, and the petitioner's rehabilitative efforts, general reputation for truth, and professional ability. The hearing may be continued from time to time as the administrative law judge designated in Section 11371 of the Government Code finds necessary.

(f) The administrative law judge designated in Section 11371 of the Government Code reinstating a certificate or modifying a penalty may recommend the imposition of any terms and conditions deemed necessary. . . .

5. California Code of Regulations, title 16, section 1360.2, states:

When considering a petition for reinstatement of a license, certificate or permit holder pursuant to the provisions of Section 11522 of the Government Code, the division or panel shall evaluate evidence of rehabilitation submitted by the petitioner considering the following criteria:

(a) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

(b) Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480.

(c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subsections (a) or (b).

(d) In the case of a suspension or revocation based upon the conviction of a crime, the criteria set forth in Section 1360.1, subsections (b), (d) and (e).

(e) Evidence, if any, of rehabilitation submitted by the applicant.

Factors in Determining Rehabilitation

6.....Rehabilitation is a state of mind, and a person who has reformed should be rewarded with the opportunity to serve. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) "While a candid admission of misconduct and a full acknowledgement of wrongdoing may be a necessary step in the process, it is only a first step. In our view, a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice....." (*In re Conflenti* (1981) 29 Cal.3d 120, 124-125.)

7. "The evidentiary significance of an applicant's misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct." (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.)

Cause Exists to Terminate Petitioner's Probation

8. Petitioner showed by clear and convincing evidence that he is sufficiently rehabilitated such that it would not be against public interest to terminate his probation. Petitioner has whole heartedly embraced his sobriety. He regularly attends AA, even attending international meetings, has a sponsor and sponsors others,

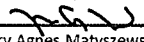
especially seeking out persons new to sobriety who are incarcerated or struggling. Petitioner enjoys the strong support of Dr. Smith, Dr. Van Der Voort, Ms. Glassmoyer, colleagues, his family, and his treaters at Promises. He has a strong support system and demonstrated a deep understanding of the importance of maintaining his sobriety. Petitioner presented as a humble, changed man who cherishes his sober life and intends to keep it. On this record, public protection does not require that he remain on probation.

Petitioner, having met his burden of proof, shall have his license fully restored.

ORDER

The petition of Rex Lloyd P. Rhoten, M.D., for early termination of his probation is granted.

DATE: March 23, 2022


Mary Agnes Matyszewski (Mar 23, 2022 13:59 PDT)

MARY AGNES MATYSZEWSKI

Administrative Law Judge

Office of Administrative Hearings